Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs (2007–)

2015

Remax Elite Dba, Hilary "Skip" Wing, Aspenwood Realestate Corporation, Plaintiffs v. Still Standing Stable, Lc, Charles "Chuck" Schvaneveldt, and Cathy Code, Defendants

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellant, *Remax Elite v Still Standing*, No. 20140978 (Utah Court of Appeals, 2015).
https://digitalcommons.law.byu.edu/byu_ca3/3507

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

REMAX ELITE DBA, HILARY "SKIP" WING, ASPENWOOD REAL ESTATE CORPORATION, ELITE LEGACY CORPORATION, Plaintiffs v. STILL STANDING STABLE, LC, CHARLES "CHUCK" SCHVANEVELDT, AND CATHY CODE, Defendants	No. 20140978-CA Second District Case No. 060906802

BRIEF OF APPELLANT CHUCK SCHVANEVELDT

Appeal from a judgment entered in the Second Judicial District Court
Weber County, State of Utah, Honorable Noel S. Hyde

Karra J. Porter, 5223
Phillip E. Lowry, 6603
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 323-5000
Attorneys for Defendant/Appellant Chuck Schvaneveldt

L. Miles LeBaron
Dallin T. Morrow
LEBARON & JENSEN, P.C.
476 West Heritage Park Blvd., #200
Layton, Utah 84041
Attorneys for Plaintiffs/Appellees Skip Wing, et al.

FILED
UTAH APPELLATE COURTS
JUL 15 2015

IN THE UTAH COURT OF APPEALS

REMAX ELITE DBA, HILARY "SKIP" WING, ASPENWOOD REAL ESTATE CORPORATION, ELITE LEGACY CORPORATION, Plaintiffs v. STILL STANDING STABLE, LC, CHARLES "CHUCK" SCHVANEVELDT, AND CATHY CODE, Defendants	No. 20140978-CA Second District Case No. 060906802

BRIEF OF APPELLANT CHUCK SCHVANEVELDT

Appeal from a judgment entered in the Second Judicial District Court
Weber County, State of Utah, Honorable Noel S. Hyde

Karra J. Porter, 5223
Phillip E. Lowry, 6603
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 323-5000
Attorneys for Defendant/Appellant Chuck Schvaneveldt

L. Miles LeBaron
Dallin T. Morrow
LEBARON & JENSEN, P.C.
476 West Heritage Park Blvd., #200
Layton, Utah 84041
Attorneys for Plaintiffs/Appellees Skip Wing, et al.

PARTIES TO THE PROCEEDING

In addition to the parties on appeal identified in the caption, Tim Shea, Shane Thorpe, Scott Quinney, and ReMax Realty were parties in the case below. A third party named Dale Quinlan owned the dba ReMax Elite.

TABLE OF CONTENTS

ADDENDUM

Exhibit 1 For Sale By Owner Commission Agreement & Agency Disclosure (FSBO)

Exhibit 2 Real Estate Purchase Contract – Land (REPC)

Exhibit 3 Ruling and Order on June 19, 2014 Hearing of Defendants' Rule 60(b) Motion

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code § 78A-3-102(3).

ISSUES PRESENTED FOR REVIEW

ISSUE 1: WHETHER PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

Standard of review: Determinations of the legal requirements for standing are reviewed for correctness. *Jones v. Barlow*, 2007 UT 20, ¶ 10, 154 P.3d 808. The same is true for review of mootness, which directly impacts standing. While a Rule 60(b) motion is generally reviewed for abuse of discretion, when that motion is predicated on an interpretation of whether jurisdiction exists under a Utah statute, the jurisdictional analysis is reviewed for correctness. *Jackson Constr. Co. v. Marrs*, 2004 UT 89, ¶ 8, 100 P.3d 1211; *Franklin Covey Client Sales v. Melvin*, 2000 UT App 110, ¶ 8, 2 P.3d 451, 454; *see also Lamoreaux v. Black Diamond Holdings*, 2013 UT App 32, ¶ 5, 296 P.3d 780.

Preservation: Standing is a jurisdictional requirement, *Brown v. Division of Water Rights*, 2008 UT App 353, ¶ 6, 195 P.3d 933, and therefore can be raised at any time. *Chen v. Stewart*, 2005 UT 68, ¶ 50, 123 P.3d 416. The issue of whether Plaintiffs had statutory standing was also raised in the lower court. (*E.g.*, R. 1407; R. 1414-24; R. 1498-1503; R. 1885; R. 6819; R. 6864; R. 7009.) It was further raised in the Rule 60(b) motion, (R. 7294), as was Schvaneveldt's

compliance with Rule 60(b)'s timeliness and diligence requirements. (R. 7311-19.)

DETERMINATIVE STATUTES, RULES, AND ORDINANCES

Assumed name statute

Utah Code § 42-2-10:

> Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:
> (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state;....

Revised Limited Liability Company Act (2006)

Utah Code § 48-2c-116:

> A member or manager of a [limited liability] company is not a proper party to proceedings by or against a company, except when the object is to enforce a member's or manager's right against, or liability to, the company.

Utah Code § 48-2c-601:

> [N]o organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company.

Utah Code § 48-2c-802(3):

> [U]nless the articles of organization expressly limit their authority, any member in a member-managed company, or any manager in a manager-managed company, may sign, acknowledge, and deliver any document transferring or affecting the company's interest in real or personal property, and if the authority is not so limited, the document shall be conclusive in

favor of a person who gives value without knowledge of the lack of authority of the person who signs and delivers the document.

Rule 60(b), Utah Rules of Civil Procedure.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* -- On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

URCP Rule 60

STATEMENT OF THE CASE

Nature of the case, course of proceedings and disposition below

This case arises out of a failed real estate transaction. Much of the history of the case has been related in other briefs, particularly Appellant's Brief in case number 20130746-CA. Summarizing, Appellant Charles "Chuck" Schvaneveldt challenged the Plaintiffs' standing throughout this case. After trial particular facts

came to light as to Plaintiffs' efforts to deflect the standing arguments, namely, that a heretofore unknown broker, Dale Quinlan, was the only person who could bring the suit. Schvaneveldt brought this to the district court's attention through a motion shortly before the final judgment was entered, and then through Rule 60(b). The Rule 60(b) motion was denied. Procedural facts relating to the Rule 60(b) relief follow.

ReMax Elite, a dba, interpled earnest money being disputed by two parties to a real estate contract, Emmett Warren and or Assigns (Buyers) and Still Standing Stables, LLC (Seller). The contract was a Real Estate Purchase Contract ("REPC"), along with a For Sale By Owner Commission Agreement & Agency Disclosure ("FSBO"). (R. 38; 68-78.) A copy of the FSBO is attached hereto as Add. Exh. 1, and the REPC is attached as Add. Exh. 2.

Nearly two years later, Buyers and Seller settled their dispute. ReMax Elite then asserted claims for a commission against Still Standing Stables, Schvaneveldt (a member of the LLC), and Cathy Code (Schvaneveldt's girlfriend and later wife).

This appeal treats the Plaintiffs' standing to maintain this action, and, specifically, whether crucial events affecting that standing were not considered by the district court through its rejection of Schvaneveldt's Rule 60(b) motion. As required by U.R.A.P. 24(a)(7), Schvaneveldt hereby provides (as briefly as possible) the relevant procedural history of the case with record citations:

After the dba ReMax Elite filed its interpleader action against the parties to the REPC, Buyers (identified by ReMax Elite as "Purchaser") and Still Standing Stables (identified as "Seller"), (R. 1), Still Standing Stables answered and counterclaimed against ReMax Elite and Buyers' real estate agent, Tim Shea. (R. 30.) Buyers answered, adding a cross-claim against Still Standing Stables and a third-party complaint against Schvaneveldt. (R. 52.) Schvaneveldt and Still Standing Stables answered Buyers' third party complaint and cross-claim (R. 95).

After various amendments, early in 2008 Buyers and their assign reached a settlement with Still Standing Stables and Schvaneveldt, and the claims between them were dismissed by the court. (R. 538.) ReMax Elite and Buyers' agent Shea then amended their pleadings to demand a sales commission from Still Standing Stables under the FSBO. (R. 554.) The trial court ultimately barred Shea from pursuing this claim, as a claim for commission can only be brought by a licensed broker, not an agent. (R. 1081.)

After a large portion of discovery was complete, Still Standing Stables added as additional third-party defendants Hilary "Skip" O. Wing, Shane Thorpe, Scott Quinney, Aspenwood Real Estate Corporation dba ReMax Elite, Aspenwood Realty, LLC, Aspenwood Elite, and ReMax Realty. (R. 828.) It was alleged that ReMax Elite was simply a dba of Aspenwood Real Estate Corporation. The other

third-party defendants participated, it was alleged, in the management of Aspenwood Real Estate Corporation, either as principals, subsidiaries, or dbas. *Id.*

ReMax and Shea then amended their complaint and third-party counterclaim again, adding as a defendant Schvaneveldt and as a Third Party Defendant Code. (R. 1232.) When answering this amended pleading, Schvaneveldt included as a third-party complaint the same causes of action against the Aspenwood parties previously alleged by Still Standing Stables. (R. 1303.) Still Standing Stables and Schvaneveldt then filed a motion for summary judgment contending that ReMax Elite, a dba, could not collect a commission because it was not a broker nor owned by a broker. (R. 1407.) The trial court denied the motion. (R. 1885.) It was in this timeframe that mention of a Mr. Dale Quinlan first appeared in the record—in his deposition Shea stated that Quinlan was his first principal broker. This mention was neither material nor remarkable. (R. 1216.)[1]

Despite already being named as third-party defendants in the litigation, Wing, Elite Legacy Corporation, and Aspenwood Real Estate Corporation moved to add themselves as plaintiffs, asserting that ReMax Elite was their dba. (R. 2318.) Their objective was to dispense of Schvaneveldt's persistent objections based on standing by naming as plaintiffs those, they contended, constituted (either

[1] Quinlan's name also figures on the ReMax letterhead used by Wing when he sent a letter setting the stage for the interpleader action. (R. 21.) Quinlan's name is one of many identified as real estate agents along the left margin. He is specifically not identified as a broker or principal broker.

individually or collectively) a broker that owned the dba and that could collect the commission. Shortly thereafter, these plaintiffs moved for summary judgment on all of Still Standing Stable's claims against them (R. 2887).

The characters in the litigation were now beginning to gel. On the plaintiff's side, Wing was a principal broker, and associated with him, he alleged, were a mixture of persons and entities that together constituted his brokerage: entities, associate brokers and agents. These included (by their narratives) Tim Shea, Elite Legacy Corporation, Aspenwood Real Estate Corporation, Aspenwood Elite Legacy Corporation, Shane Thorpe, Scott Quinney, Aspenwood Realty, LLC, Aspenwood Elite, and ReMax Realty. Wing initially alleged that Aspenwood Real Estate Corporation owned the ReMax Elite dba. (Later, ReMax Elite Legacy Corporation would also claim to own the ReMax Elite dba (R. 2364). On the defendants' side figured Still Standing Stables, its member Schvaneveldt, and his wife, Code. Defendants had requested in discovery the identity of the ReMax owners' group; many of those identified were now parties. Quinlan was not identified as a member of that group, and was not a party (R. 7369), but later was admitted by Plaintiffs to be the owner of the dba at the time the REPC and FSBO were signed. (R. 8087.) Wing attributed the misidentification of the proper owner of the dba to his being "mistaken." (R. 8094.)

The day before trial, the court dismissed Still Standing Stables as a defendant. (R. 8383, pp. 17-20; R. 5613.) The case then proceeded to trial against Schvaneveldt and Code. At the conclusion of Plaintiffs' case in chief, Schvaneveldt moved for a directed verdict, which was denied. (R. 5317.)

Code moved for a directed verdict, which was granted. (R. 5424.) The jury entered a verdict against the sole remaining defendant, Schvaneveldt. Final judgment was then entered on January 2, 2013, with the only remaining issue being the determination of attorney fees. (R. 6067.) Schvaneveldt filed a motion for new trial (R. 6200), which was denied. (R. 6510.) Other post-trial motions went forward, and ultimately Still Standing Stables was awarded $2,659.73 in costs. (R. 6732.)

When an attempt was made to collect these costs, Wing denied that he was liable for them because, he argued, he was not a party to the contract on which ReMax Elite was suing. This prompted Still Standing Stables to bring a motion to identify real parties in interest, the nub of which was a contention that none of the plaintiffs had standing to pursue a commission. (R. 6819.) Schvaneveldt filed a companion motion, seeking dismissal of all of the named commission claim plaintiffs with prejudice and to have the judgment struck or otherwise made void. (R. 6864.)

Part of Schvaneveldt's strategy was to demonstrate that Wing was represented in the action together with the other plaintiffs with which he had entered earlier in the litigation. In the course of arguing that point, Schvaneveldt attached a portion of Wing's deposition, in which Wing disavowed any role of Quinlan as a broker or owner of the dba. His statement was that Quinlan as "out of the picture." (R. 5785-86; 5820.)

At this point Schvaneveldt had concluded that Quinlan was very much in the picture. His central argument was that Quinlan was the principal broker who had established, registered, and owned the dba ReMax Elite, the status of which had vexed the entire litigation. At least two of the Plaintiffs had claimed that they owned the dba. Now Quinlan appeared with documentation from the State of Utah that it was his. Quinlan also submitted an affidavit indicating that he had never transferred any commission agreement or contract rights to any other individual nor entity. Quinlan owned the ReMax Elite dba at the time of the execution of the FSBO and REPC in 2006. As such, the defendants argued that he was required to be the party seeking the commission. Moreover, Quinlan was no longer a principal broker at the time of the FSBO and REPC. Because Quinlan was neither a principal broker nor named as a party, the defendants argued, the commission claims asserted by his dba were void. (R. 6864.)

While the motions to dismiss and to identify real parties in interest were pending, Still Standing Stables and Schvaneveldt entered into a settlement agreement with Quinlan and his dba ReMax Elite to dismiss ReMax Elite's claims related to the commission. (R. 6990-91.) Settlement was limited to those parties identified as parties to the commission agreement, reserving any claims that Still Standing Stables or Schvaneveldt might have against others (Wing and the amalgam of others constituting his brokerage who remained as litigants). *Id.* The settlement agreement was the centerpiece of a motion Schvaneveldt filed to dismiss all of ReMax Elite's claims based on settlement agreement, (R. 6987), filed shortly after briefing on the real party and dismissal motions was complete.

The district court on July 22, 2014, denied the real party and dismissal motions, and in the same order issued its final order calculating attorney fees and costs. (R. 7009.) The court first concluded that Wing could not avoid liability for attorney fees under the FSBO by characterizing himself as a nonparty to the agreement. The court then said that it was "dismay[ed]" at the reassertion of standing arguments by the defendants at this point in the proceedings. While standing may be raised at any time during litigation, the court reasoned that it had lost jurisdiction once a final judgment was entered.[2] After expressing its hesitancy

[2] Final judgment was entered January 2, 2013 (R. 6067), but the final appealable order was not entered until the court issued this very order in which it referred to the final judgment, issued July 22, 2013. (R. 7009.) Hence Schvaneveldt was

to even engage in any analysis at all, the court concluded that the evidence suggesting that Wing was not the principal broker and that Quinlan owned the dba could have been found earlier, and therefore defendants' standing arguments were untimely. *Id.*

Schvaneveldt then filed a Rule 52(b) motion to amend findings in the final judgment. (R. 7088.) He requested that all three named plaintiffs be removed from the commission judgment because none of them was the actual party to the FSBO agreement. He also requested that the court recognize as an undisputed fact that Quinlan was the certified and record owner of the dba ReMax Elite. He finally requested that a letter of transfer dated 9 March 2006, purporting to transfer the dba to Wing, and the Aspenwood articles of incorporation (which might also be used to substantiate a transfer of the dba) be authenticated. Schvaneveldt contended that neither document was executed by Quinlan, and submitted an expert report to that effect (R. 7115) and a supporting affidavit from Quinlan. (R. 7899.)

While this motion was pending, the court denied Schvaneveldt's motion to dismiss based on the settlement agreement. (R. 7147.) The court cited timeliness

---

faced with a Catch-22 per the district court's reasoning: he could not raise standing because the district court had lost jurisdiction, but could not file a Rule 60(b) motion because up to that point no appealable order had been entered. But there was no Catch-22: the district court erred in stating it had lost jurisdiction. The district court always retained jurisdiction to rule on its jurisdiction, even at the time it entered the July 22 order.

and due diligence concerns, concluding that Quinlan's settlement did not have the effect Schvaneveldt claimed: "settling a claim that could be raised by third party does not per se indicate that the plaintiffs in this case did not have standing to assert their claims. At best the new evidence would raise material question of fact concerning proper ownership of the commission claim."

Just over a month after filing his Rule 52(b) motion, Schvaneveldt filed a Rule 60(b) motion, the substance of which was that overwhelming documentation now showed that Wing was not the principal broker of the dba ReMax Elite, and therefore there was no proper party plaintiff in the action. (R. 7287.)

No ruling was issued on the Rule 52(b) or Rule 60(b) motions for approximately nine months. At that point, Schvaneveldt submitted to the court supplemental exhibits and an additional memorandum in support of his Rule 52(b) and Rule 60(b) motion. (R. 7854.) This evidence showed that Wing was not the owner of the contracting party dba ReMax Elite and was never the principal broker for the dba. *Id.*

The court denied the rule 52(b) motion. (R. 8234.) The court found that information contained within the Division of Corporations and Commercial Code ("Commercial Division")(including a determination by the State that the purported 2006 transfer documents were forgeries, and that the dba had never been transferred by Quinlan), could have been discovered before trial, and in dictum

opined that ownership of the dba might be split between legal and equitable owners. (R. 8240-41.) The court also speculated that Quinlan "may have been simply functioning in his capacity as a participant in the business entity that owned the dba of ReMax Elite, when his name was placed on that document [registration of the dba]." With respect to Wing, the court stated that "to the extent that Skip Wing is identified as a party in these proceedings, or as the holder of any claims, that identification is Mr. Skip Wing, in his representative capacity, as principal broker for the brokerage, or as an agent or representative of the brokerage, and does not represent his individual and personal ownership of those claims." (R. 8243.)

The trial court also denied the Rule 60(b) motion. (R. 8254, ruling attached as Add.Exh.3.) The court concluded that relief under Rule 60(b)(6) was not available. With respect to Rule 60(b)(5), the court ascribed no legal significance to Quinlan's settlement with the defendants because Quinlan's ownership status had not been conclusively established. With respect to Rule 60(b)(4), the court noted that arguments regarding standing had already been rejected in previous rulings. The court said that there were two separate questions at issue: Is there a properly registered dba for the business entity that asserted the claim, and who owns that dba? There may be argument about who owns a dba, the court said, but this did

not necessarily go to whether the lawsuit could be maintained by the dba in question. (R. 8263.)

Related to other post-trial motions concerning the ownership of the dba, Still Standing Stable not only had settled all outstanding claims with Quinlan and ReMax Elite, but it had also had secured ownership of and registered the ReMax Elite dba. Based on these facts, Still Standing filed a motion to be substituted as plaintiff under Rule 25 as the rightful owner of the dba. (R. 8110.) The motion was denied. (R. 8444, pp. 30-36.) All parties appealed some aspect of the court's rulings and final judgments.

In connection with the Rule 60(b) motion, Schvaneveldt presented a collection of evidence supporting his position that the Plaintiffs had been deceptive to validate their standing when they had none. That evidence included:

1. Quinlan applied for the ReMax Elite dba in December 2004, a fact admitted by Plaintiffs. (R. 7297.)

2. Plaintiffs contended that Quinlan transferred the ReMax Elite dba to Aspenwood in March, 2006. (R. 7299.)

3. Quinlan submitted a declaration, signed July 5, 2013, that he owned the dba at the time of execution of both the FSBO and the REPC. (R. 7298-99.) He also stated that he did not transfer any rights in any commission or FSBO to any entity. (R. 7299.)

4. Schvaneveldt submitted A Letter of Transfer dated March 9, 2006, allegedly signed by Quinlan to ReMax, and later filed with the Commercial Division. (R. 6874.) Quinlan in his declaration denies signing the letter and contends that is was forged. (R. 7300.)

5. Schvaneveldt submitted a report from a forensic signature analyst declaring a high probability that the Quinlan signature on the March 9, 2006, letter was forged. (R. 7300.) This same report reflects high probability of forgery of Quinlan's signature on Plaintiff Aspenwood's Articles of Incorporation. (R. 7300-01.)

6. Wing never claimed ownership of the dba ReMax Elite. (R. 7301.)

7. Wing actively concealed Quinlan's ownership of the dba ReMax Elite, and deflected attention away from Quinlan by claiming the dba was owned by another. (R. 7304-6; 7311-19.)

8. Quinlan surrendered his broker license under threat of censure in July, 2005. (R. 7305.)

9. The Commercial Division took administrative action to invalidate the transfer to Quinlan, based upon evidence of forgery, in December, 2013. (R. 7733.)

SUMMARY OF ARGUMENT

The district court erred by not granting the Rule 60(b) motion. It should have dismissed the case and struck the judgment because the Plaintiffs do not have standing to sue Schvaneveldt for recovery of a real estate commission under the FSBO agreement. Utah law is clear that only a principal broker can seek recovery for a real estate commission. The dba ReMax Elite is identified as the brokerage company party to the FSBO. The undisputed evidence shows that none of the Plaintiffs were the principal broker of dba ReMax Elite when the FSBO was executed, and none of the Plaintiffs ever became the principal broker of dba ReMax Elite. Rather, dba ReMax Elite was established, registered and owned by Dale Quinlan, a former principal broker.

Quinlan did not sue the Defendants and assigned all of his interest and the interest of dba ReMax Elite in the FSBO agreement to Still Standing Stable, L.C. Accordingly, the Plaintiffs, never having been the principal broker for dba ReMax Elite, lacked, and continue to lack, standing under Utah law to sue Schvaneveldt under the FSBO. They cannot cure that defect. The evidence to this effect was dispositive and was the basis for striking the judgment in its entirety. Alternatively, the evidence was sufficiently probative to justify striking the judgment and addressing through the adversarial process concerns raised by Plaintiffs as to the evidence's reliability and probativeness.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION.

Whether a party has standing to bring or maintain an action is a matter of the court's jurisdiction. The party pursuing the claim bears the burden of establishing standing. *Society of Professional Journalists v. Bullock*, 743 P.2d 1167, 1171 (Utah 1986).

In this case, the plaintiffs cannot establish standing for two independent reasons: First, by statute the Plaintiffs lacked standing in the court below. Second, the claimholder and associated rights have now been acquired by one of the defendants, Still Standing Stable, which does not wish to continue the action against Schvaneveldt. Because standing was raised early and often throughout the course of the litigation, Schvaneveldt discusses the substantive standards governing standing, how the standing issue evolved in the proceedings, and how standing and the associated notion of mootness were raised in the Rule 60(b) motion.

A. The Plaintiffs lacked standing in the court below.

Utah statutes impose specific restrictions on who may bring an action seeking a real estate commission. Under Utah law, only a "principal broker" can contract for, and later seek in the courts, a real estate commission:

> No sales agent or associate broker may sue in is own name for the recovery of a fee commission or compensation for services as sales

> agent or associate broker unless the action is against the principal broker with whom he is or was licensed. Any action for the recovery of a fee, commission or other compensation may only be instituted and brought by the principal broker with whom the sales agent or associate broker is affiliated.

U.C.A. § 61-2-18 (now Utah Code § 61-2f-305).[3]

The purpose of this brokerage provision is to closely regulate the real estate industry to protect the public. *Global Recreation, Inc. v. Cedar Hills Development Co.*, 614 P.2d 155, 158 (Utah 1980); 12 *AmJur 2d* Brokers § 8. Consistent with the statute, Utah courts deny nonbrokers statutory standing to sue for commissions. *See, e.g., Diversified Gen. Corp. v. White Barn Golf Course*, 584 P.2d 848 (Utah 1978). Likewise, the trial court barred one of the original plaintiffs, Tim Shea, from suing for a commission under this statute. (R. 1885.)

Because only a principal broker can collect a real estate commission in Utah, the number of persons who can bring such actions is small. Apart from this unique privilege of suing to collect commissions, a broker is free to conduct business as he or she sees fit under the various options provided for by law, for example, as a

---

[3] The Utah statutory scheme in place at the time of the REPC and FSBO contemplated a "principal broker" as the person who engages in the selling or listing for sale real estate for commission. A principal broker must be licensed by the state. Utah Code § 61-2-1 (2006). An associate broker is an independent contractor engaged by the principal broker. Utah Code § 61-2-2 (2006). A brokerage is the business activity (or office) of the broker, whether it be in the form of an entity or collection of entities and independent contractors that is supervised by the broker.

corporation, limited liability company, limited partnership, or the like. A common tool used by business entities to enhance their brand and to make doing business easier is an assumed name.

State statutes allow persons and entities to do business under assumed names, commonly known as a "doing business as" or "dba" names. However, the legislature also requires central registration of dbas to provide notice to the world that someone or something is acting under a fictitious identity. *See generally* Utah Code § 42-2-5, *et seq.*

By statute, any person or entity who fails to properly register a dba is barred from bringing or maintaining an action:

> any person who carries on, conduct, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter complied with: (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross-complaint, or proceeding in any of the courts of this state . . . .

Utah Code § 42-2-10.

This defect may be cured through proper registration while the action is pending. *See, e.g., Graham v. Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶¶ 15-16, 979 P.2d 363 (allowing amendment of pleadings after failure to register dba was cured). In this case, however, there was no cure and, as discussed below, there can never be one.

As noted above, the action was commenced by a dba, ReMax Elite. The FSBO itself was also in the name of "Re/Max Elite" *See* pp. 4-7 *supra* (Add.Exh.1, p. 1 § 1.) ReMax Elite was originally registered by a principal broker, Dale Quinlan, on December 28, 2004. (R. 6904, 6922.) Quinlan owned the dba ReMax Elite from the time he registered it in 2004 until it expired in January 2008. (R. 1702-03, 8044.) Normally, there would be nothing particularly noteworthy about a principal broker utilizing a dba. Here, however, Quinlan ceased functioning as a principal broker in late 2005. (R. 7305, 7353.) Skip Wing came in as a successor principal broker for the group of individuals and entities that comprised his brokerage. *Id.* Significantly, however, Wing was never assigned any interest in the ReMax Elite dba, which Quinlan continued to own. *See* pp. 5-7, *supra.*

Thus, at the time of the transaction concerning Schvaneveldt (both the execution of the FSBO and the REPC), Wing was functioning as a principal broker – but not for the entity named on the two contracts (ReMax Elite). The only individual signing the two documents was the agent Tim Shea, who was incapable of binding the owner of the dba, since he was not acting on behalf of that owner

(Quinlan) and was not in any event able to act in any capacity on behalf of Quinlan, who was no longer acting as a principal broker.[4]

This disconnect between the ReMax Elite dba and a principal broker is dispositive. Only a principal broker can contract for and seek a commission under Section 61-2-18; accordingly, for a dba to do the same, it must be a properly registered dba of a principal broker, as provided in Section 42-2-5, *et seq*. In short, the principal broker statute significantly narrows the class of individuals who might seek a real estate commission. The dba statute narrows that class even further, in this case, down to one person: Dale Quinlan.

Schvaneveldt raised standing concerns early on in the litigation, putting the appellees on notice that the dba was not a proper party plaintiff. (*E.g.*, R. 601 (filed June 23, 2008).) The expired dba's lack of standing later became the gravamen of a motion for summary judgment. (R. 1702-03.)

There is ample evidence that Wing and the other plaintiffs realized that the dba under which they were purporting to sue was never registered to Wing, and the ramifications thereof. Wing filed a declaration stating that, in the spring of 2006, Quinlan had approached the other owners of his company, Aspenwood Real Estate

---

[4] There are instances when naming individually the owners of a dba may cure a defective dba registration. *See, e.g., Blodgett v. Zions First Nat'l Bank*, 752 P.2d 901, 905-06 (Utah Ct. App. 1988); *Utah Valley Bank v. Tanner,* 636 P.2d 1060, 1062 (Utah 1981). That, however, did not occur here. Quinlan was never named as a party. Even if he had been, it would have cured nothing when he was not a principal broker at the time of the transaction and when the dba later expired.

Corporation, and had transferred the ReMax Elite dba to Aspenwood. (R. 7495, ¶¶ 7-12.) However, after an investigation involving the director of the Commercial Division, the State of Utah determined that the documents purporting to transfer the dba from Quinlan to Aspenwood were forgeries, and that ownership of the dba had never been transferred. (R. 7318, 7332-7350, 8146.) The Plaintiffs did not appeal or otherwise challenge the State's ruling. Record, *passim*.

The Plaintiffs' inaction is significant. When opposing Schvaneveldt's Rule 60(b) motion, Plaintiffs argued that they had no opportunity to challenge the evidence that Schvaneveldt had introduced supporting his Rule 60(b) motion. While Plaintiffs accused Schvaneveldt below of "sneaking around" the Commercial Division and made further disparaging remarks about its executive staff (R. 7975), they never took substantive steps to challenge the Commercial Division's determination that Quinlan was and always has been the owner of the ReMax Elite dba.

Yet Plaintiffs could have mounted such a challenge, and in the process avail themselves of due process. There were several avenues that plaintiffs could have pursued to challenge the Division's determination that Quinlan owned the ReMax Elite dba.

Under Utah Administrative Code R154-100-2, adjudicative proceedings before the Commercial Division concerning assumed names are conducted on an

informal basis. This accounts for the nature of Ms Berg's letter. That action constituted a final order under Utah Administrative Code R154-100-2. To challenge that order, the first option the Plaintiffs had was to file a request for agency action with the Division under section 63G-4-201 of the Utah Code. Second, Plaintiffs could have filed a motion with the Division under Rule R151-4-301 of the Utah Administrative Code. Third, Plaintiffs could have requested that the Utah Department of Commerce review the Division's determination that Quinlan was the proper owner of the ReMax Elite dba under R151-4-901 of the Utah Administrative Code and section 63G-4-301 of the Utah Code. Fourth, if the Division and Department of Commerce refused to remedy the alleged procedural improprieties, Plaintiffs could have sought a trial de novo with a district court under Utah Code 63G-4-402. Fifth, Plaintiffs could have requested relief under Rule 65B of the Utah Rules of Civil Procedure. *See Tolman v. Salt Lake Cnty. Attorney*, 818 P.2d 23 (Utah Ct. App. 1991) (vacating a district court's decision not to grant extraordinary relief from an administrative body's decision, where the body "abused its discretion" in failing afford due process).

Through any of these avenues, Plaintiffs could have argued that the Division failed to comply with procedural requirements of the Utah Administrative Procedures Act or constitutional due process and asked to have the Division's

determination that Quinlan owned the ReMax Elite dba set aside, at least until the Division provided adequate process. Plaintiffs pursued none of these avenues.[5]

For whatever reason, the Plaintiffs made no attempt to challenge the Commercial Division's actions, either administratively or judicially. The district court, in its ruling questioning the propriety of using the administrative order as part of the chain of events leading Schvaneveldt to seek dismissal, did not invoke any governing regulations or statutes. Thus, the district court predicated its decision on an incorrect understanding of the law. The Plaintiffs simply chose not to act, and the district court did not question that inaction, without citation to authority. In this respect the Plaintiffs prevailed, but in the process have now waived whatever right they may have had to challenge the agency action. Quinlan is now vested with the dba, it has been transferred to Still Standing Stable (R. 8123), and those parties have settled. The only issue remaining, then, is whether that set of facts satisfies the standard for Rule 60(b) relief.

---

[5] By requesting relief under Rule 60(b), moreover, Schvaneveldt alternatively sought below, and also alternatively seeks here, the very process that Plaintiffs claim has been denied them. Schvaneveldt requested that the trial court hold a hearing to consider and weigh the Quinlan evidence. (R. 7319.) At the hearing, Plaintiffs would have the opportunity to test the reliability and credibility of the Quinlan evidence by the usual methods, including cross-examination and the submission of countervailing evidence. The district court refused to hold such a hearing. It is to address this very point that Schvaneveldt has requested, as alternative relief in this appeal, that this Court reverse the district court on this point and remand for a further hearing on the matter.

No party with standing brought this action. The plaintiff ReMax Elite dba was owned by Quinlan, who never sued under the contract, and who is not a party to either the FSBO or the REPC. At the time the claim for a commission was first made in this action, the dba had expired. While this defect might have been curable, that never happened. Even joinder of additional parties (such as Wing) later on did not cure the dba's inability to sue, since (1) the dba was expired, and (2) none of the added plaintiffs owned the dba anyway.

B. The Plaintiffs cannot cure the standing defect or show standing on appeal because one of the defendants, Still Standing Stable, has now acquired both the ReMax Elite dba and all rights of its former owner, Dale Quinlan.

After the verdict was entered in this case, Quinlan assigned all of his interest and the interest of his dba, ReMax Elite, in the FSBO agreement to Still Standing Stable. (R. 8138.) Quinlan also settled with the defendants all disputes regarding the FSBO, both personally and on behalf of the dba that he owned when the contracts at issue were signed. (R. 8126, 8142.) Additionally, in 2014, Still Standing Stable registered the available ReMax Elite dba as part of the sale and transfer from Quinlan. (R. 8207-08.)

Through these events, Still Standing Stable now is the only entity with the standing to pursue ReMax Elite's commission claim against itself and Schvaneveldt. This Court has recognized that such an assignment, and, *a fortiori*, disposition of a cause of action, can occur. *Lamoreaux v. Black Diamond*

Holdings, 2013 UT App 32, 296 P.3d 780. Such a transfer of rights "cuts off the former plaintiff's right to pursue" judgment. *Id.*, ¶ 22. In this regard, the district court erred by stating that Quinlan's settlement merely created an "issue of fact." (An issue which, significantly, the district court still chose not to address.) With the registration of the ReMax Elite dba, and assignment of the former owner's rights and other choses in action, Still Standing Stable now has the right to cut off permanently any further proceedings relating to the judgment. Accordingly, the Plaintiffs lack standing to maintain this action against the Defendants.

C. Under Rule 60(b), the evidence supporting the acquisition of the dba was dispositive so as to deprive the court of subject matter jurisdiction, or was at least sufficient to overturn the judgment and allow for further proceedings.

Schvaneveldt filed a Rule 60(b) motion below, citing Rule 60(b)(4) (the judgment was void), Rule 60(b)(5) (the matter had been settled and discharged), and Rule 60(b)(6)(there were grounds otherwise to grant post-judgment relief). He also raised fraud and deception, which provide a basis for relief under Rule 60(b)(3). The assignment of the dba and causes of action from Quinlan to Still Standing was grounds for any of these bases for relief to issue, whether the effect was to overturn the judgment and strike the complaint, or overturn the judgment and allow for further proceedings to develop the evidence concerning standing and mootness.

i. Schvaneveldt was diligent in presenting evidence and law depriving the district court of subject matter jurisdiction.

A common theme in the district court's analysis of the Rule 60(b) arguments was diligence and timeliness. Accordingly, Schvaneveldt treats diligence preparatory to discussing each subsection individually.

Schvaneveldt presented evidence of lack of standing below early and often. The evidence is significant because it speaks to two crucial issues confronting the court: standing (which is a derivative of jurisdiction) and mootness. Any evidence concerning standing should have been considered, especially given that the Plaintiffs had the burden to demonstrate their standing. *Brown v. Div. of Water Rights of the Dep't of Natural Res. of Utah*, 2010 UT 14, ¶14, 228 P.3d 747. If during the proceedings evidence demonstrates that that burden has not been met, the court is divested of subject matter jurisdiction. *Wash. Cnty. Water Conservancy Dist. v. Morgan,* 2003 UT 58, 82 P.3d 1125.

Relatedly, the facts presented by the Rule 60(b) motion render this case moot. "Generally, 'a case is deemed moot when the requested judicial relief cannot affect the rights of the litigants.'" *Tillotson v. Meerkerk*, 2015 UT App 142 ¶9, --- P.3d. --- (citing *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989)). Mootness, like standing, goes to the court's jurisdiction. If a case is moot, no controversy is pending before the court, and the court lacks subject matter jurisdiction. Acquiring the dba and rights of action from Quinlan effects a merger

of the claimant with the claimee, thus rendering further prosecution of the claim moot. As noted above, this is a common occurrence with legal effect. *Lamoreaux v. Black Diamond Holdings*, 2013 UT App 32, 296 P.3d 780.

To protect its rights, Still Standing could be expected to do no less than acquire the dba if it was available. The series of events and transactions leading up to Still Standing's acquisition of the dba rendered moot any claims Plaintiffs asserted in the dba, since the owner of the dba is merged with the same entity asserting claims against the dba.

The Rule 60(b) motion was thus a final attempt to persuade the district court to consider the standing argument, given that not only had the Plaintiffs failed to demonstrate that they had standing, but their case had become moot.

Schvaneveldt filed his Rule 60(b) motion based in part on the significant developments arising late in 2012 and into the summer of 2013: Quinlan's coming forward with the relevant facts surrounding the (non)transfer of the dba, the Utah Department of Commerce's renunciation of the assignment of the dba from Quinlan to Aspenwood, and the subsequent transfer of the dba to Still Standing Stable, L.C. (this last fact being the most significant, since it moots Plaintiffs' claims).

Quinlan's role in this case was apparent very late, thanks in large part to Wing's concealment of that role. Quinlan's name first appeared in the record on a

huge ReMax letterhead as a mere agent, not a broker. (R. 21.) Shea mentioned him in passing in his deposition as the first principal broker under which Shea worked; this discussion mentioned nothing about the dba or Quinlan's ownership or transfer of it. (R. 1216.) Wing, in his deposition, states that Quinlan was "out of the picture," (R. 5820), does not list Quinlan as part of the ReMax owners' group in discovery responses. (R. 7369), and falsely claimed that Aspenwood owned the dba at the time the contracts were signed. (R. 7304-05, 7354.) Schvaneveldt's attention was drawn to Quinlan when Wing began to deny that he was a party to the lawsuit in order to avoid paying costs and attorney fees; the district court acknowledged as much. (R. 7012.) Wing's protest finally allowed Schvaneveldt to see the significance of Quinlan's role, completing the puzzle—earlier in the litigation Schvaneveldt argued that Wing and the other Plaintiffs lacked standing, but now it was clear who really did have standing. So Still Standing acquired those rights in standing to moot the case, as allowed under *Black Diamond, supra* p. 25.

Plaintiffs below argued that Schvaneveldt could have figured all of this out earlier in the case. (R. 7459.) They do not say how. The only fact that could have been known before the time of the litigation was Quinlan's censure, (R. 7373), which by itself was meaningless (and which was actually concealed in discovery responses (R. 7360)). His censure did not mean he was prevented from lawfully

transferring the dba. Quinlan's involvement and the events surrounding the forgery of his signature were obscure and difficult to ascertain. The documents in the public record at the Commercial Division, R. (7329-31), and that were the basis for the assignment to Still Standing Stable, appeared on their face to be legitimate, and under the law are presumed to be so. *See* Utah Code 42-2-7(2) ("A copy of any such certificate certified by the Division of Corporations and Commercial Code shall be presumptive evidence of the facts contained in the certificate."). Thus, contrary to Plaintiffs' contention, and contrary to the district court's express refusal to even consider them, the Division's certificate showing Quinlan owned the ReMax Elite dba was binding on the district court.

Moreover, hampering Schvaneveldt's ability to conduct due diligence was Wing's active concealment of Quinlan's role. He acknowledged Quinlan's previous broker status but denied Quinlan's current relevance. In this respect Wing committed fraud through partial disclosure, and took upon himself at that point a duty to disclose the entire truth, and not merely a part of it. *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.,* 786 P.2d 1326, 1330-31 (Utah 1990). *Accord Specialty Beverages, LLC, v. Pabst Brewing Co.*, 537 F.3d 1165, 1181 (10th Cir. 2008)(duty arises in one selectively disclosing facts in order to mislead); *Union Pac. Res. Grp., v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 584 (5th Cir. 2001). That duty was enhanced through Wing's obligation to testify truthfully in his

deposition and to answer completely and truthfully discovery requests. This he did not do. Schvaneveldt vigorously argued these points below. (R. 7311-19.)

Thus, as is often the case, it was not any single event that revealed the Plaintiffs' duplicity, but the events taken collectively. It was not the dots, it was the connections, connections that Wing himself denied ever making. (R. 8094.)

Those connections did not become clear until Quinlan himself provided the essential information through his declaration. Thus, to say that this information was freely available or discoverable is not true. Even so, and significantly, the district court did not distinguish which parts of the evidence presented in the Rule 60(b) motion were available or not, or why. Despite the district court's lack of guidance or rationale, the course of proceedings shows both how evidence surrounding jurisdiction was presented early and often, and how there was a clear scheme to claim ownership of the dba and to cover up its true nature. *See* pp. 14-15, *supra*. The Commercial Division was clearly not impressed with this scheme, and acted to undo it. (Compare forgery examples at R. 7346 and R. 7347, both of which materially impacted the effect of the $4.3 million REPC).

To this last point, agency action, the district court did not assess the issues surrounding the Division's process for authorizing a dba transfer or validating a dba registration. Nor did it give any credence or deference to that action, as it was required by law to do. *See* pp. 28-30, *supra*. The district court did not, in its ruling,

cite a single case, statute or administrative rule on the issues with which it raised concerns.

Thus, there was no single piece of evidence that was a smoking gun revealing Quinlan was the true party in interest as the owner of the dba.[6] At first, the only thing Schvaneveldt knew or could have known was that the Plaintiffs certainly did not have standing; who actually did have that standing was unknown (and perhaps no one did, for all Schvaneveldt knew). Then, piece by piece, Schvaneveldt discovered individual shreds of evidence relating to who did and who did not have standing and attempted to introduce them to the district court, each time his attempt at relief being denied. Things accelerated quickly soon after the trial. With Wing's insistence that he was not party, the true nature of Quinlan's ownership became clear; he, like Schvaneveldt, was duped by the Plaintiffs; his signature had been forged; and the state was willing to act on this evidence to modify the corporate assignation of the dba. Out of this connection came the most telling piece of evidence: the assignment of the dba to Still Standing. This was enough, under any reading of the rule, to demonstrate Schvaneveldt's diligence under the rule, as it not only bolstered the notion that Plaintiffs lacked standing, but

[6] As noted, *supra* pp. 4-7, Schvaneveldt had long argued that Plaintiffs lacked standing. Quinlan's role as the true party in interested provided the missing link, and in that respect was compelling.

mooted the case. But the district court, with cursory analysis, *a priori* assumed that the evidence did not warrant consideration, and thus denied the motion.

In short, the district court was required to assess the facts that Schvaneveldt raised in the Rule 60(b) motion, but chose not to act. It did so when the facts revealed to the court were on their face novel, plausibly and timely revelatory, and highly relevant to effecting the legislature's intent behind the dba registration and commission law. Most important, they were raised in a manner compliant with the rule's requirement of due diligence. The facts raised in the motion effectively mooted the case, as a matter of law.

ii. Relief should have been granted under Rule 60(b)(3).

Rule 60(b)(3) provides for relief from a judgment when that judgment is based upon fraud. As rehearsed *supra* pp. 28-31, Wing and the other plaintiffs actively concealed Quinlan's role as owner of the dba ReMax Elite. They were compelled to do so in order to preserve their own claim to standing, inconsistent as it was with Quinlan's unique position as the only person actually with standing. As such, relief under Rule 60(b)(3) was erroneously denied by the district court.

Rule 60(b)(3) also contemplates development of further evidence if a colorable claim of fraud is presented to the court. In *Ty Inc. v. Softbelly's, Inc.*, 353 F.3d 528, 537 (7th Cir. 2003). The court held that the district court had abused its discretion when it failed to hold an evidentiary hearing despite conflicting

evidence of fraud. As an alternative to striking the judgment and entering judgment for Schvaneveldt, the district court should have conducted such a hearing. This Court, as an alternative basis for relief, can remand this matter to the district court to conduct such a hearing incident to which the parties should be permitted to conduct discovery.

iii. Relief should have been granted under Rule 60(b)(4).

Rule 60(b)(4) provides for relief from a judgment that is void. Standing is a matter of subject matter jurisdiction. A judgment entered by a court that lacks subject matter jurisdiction is not merely voidable. It is void, since the tribunal lacked the power to act from the first instant. *See Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335 (Utah Ct. App. 1991) (reversing trial court's decision not vacate judgment under the predecessor to Rule 60(b)(4), where evidence produced for the first time *after* entry of a decree of divorce established that the trial court lacked subject matter jurisdiction under then-applicable law). Here, the Plaintiffs lacked standing, and thus the court lacked subject matter jurisdiction. Quinlan's declaration, separate and apart from the equally damning assignment to the dba and letter from the Commercial Division, was enough to demonstrate that the Plaintiffs lacked standing and that, therefore, the district court lacked jurisdiction. Read together, this evidence renders the conclusion inescapable.

iv. Relief should have been granted under Rule 60(b)(5).

Rule 60(b)(5) is the applicable to a situation like this one where through assignment the claim is extinguished through merger. It states expressly that its roots are in equity. It is inequitable to enforce a judgment that no longer applies. Moreover, the court lacks the power to do so. As such, relief should have been granted under Rule 60(b)(5). As noted, *supra* pp. 25-26, post judgment assignment of a cause of action can moot a case through merger. That is precisely what occurred here.

v. Relief should have been granted under Rule 60(b)(6).

Rule 60(b)(6) provides a district court with the means to relieve a party from a judgment upon equitable grounds not otherwise specifically enumerated by Rule 60(b). If the relief Schvaneveldt seeks does not fit in to any of the grounds already argued, Rule 60(b)(6) applies. The stark facts of this case mandate such a result. The Plaintiffs proceeded in derogation of statutes specifically protecting the public from unscrupulous real estate vendors (the broker statute) and those attempting to hide their true identities (the dba statute). They actively concealed their conduct throughout the litigation. When, finally, the true facts emerged, the other shoe fell: not only was it conclusively revealed that they lacked standing, but that standing was shown to be clearly vested in another, Quinlan. Quinlan settled his claim and mooted the case. Perhaps these events do not precisely constitute fraud as

contemplated under Rule 60(b)(3), or do not precisely render the judgment void under Rule 60(b)(4), or do not precisely extinguish the judgment under Rule 60(b)(5). But they are certainly a basis to vacate the judgment under the equitable principles enumerated under the rule.

REQUEST FOR ATTORNEY FEES

The FSBO has an attorney fee provision (the same provision cited by the Plaintiffs when they received an award of attorney fees against Schvaneveldt). Add.Exh. 1 § 8. Plaintiffs lack standing. Accordingly, this Court should remand with instructions to enter judgment for Schvaneveldt. In that event, or if the Court remands for other purposes, it should provide that, should Schvaneveldt prevail on remand, he is entitled to attorney fees incurred in this appeal.

CONCLUSION

For the reasons set forth above, Appellant Schvaneveldt respectfully requests that the Court reverse the judgment and instruct the trial court to enter judgment in favor of Schvaneveldt as a matter of law. Alternatively, the Court should reverse the judgment and remand the case on the issues raised in the Rule 60(b) motion.

INCORPORATION

Pursuant to, and to the extent permitted by, U.R.A.P. 24(i), Schvaneveldt adopts by reference arguments by Schvaneveldt in case 20130746-CA which also relate to the liability of Schvaneveldt and coextensive claims.

DATED this 15th day of July, 2015.

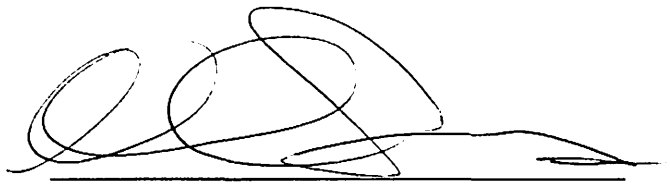
CHRISTENSEN & JENSEN, P.C.

Karra J. Porter
Phillip E. Lowry
Attorneys for Defendant / Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of **BRIEF OF APPELLANT CHUCK SCHVANEVELDT** were mailed to the following this 15th day of July, 2015:

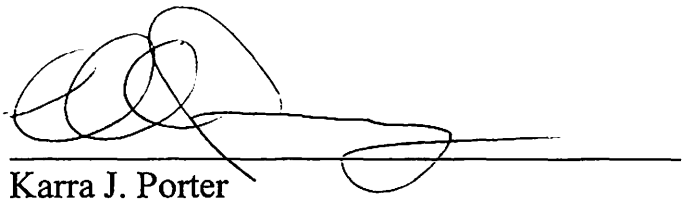
L. Miles LeBaron
Dallin T. Morrow
LEBARON & JENSEN, P.C.
476 West Heritage Park Blvd., #200
Layton, Utah 84041
Attorneys for Plaintiff/Appellee
Elite Legacy



Karra J. Porter
Phillip E. Lowry
Attorneys for Defendant / Appellant
Schvaneveldt

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for the Defendant / Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 8,802 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



Karra J. Porter
Phillip E. Lowry
Attorneys for Defendant / Appellant

ADDENDUM

Exhibit 1 For Sale By Owner Commission Agreement & Agency Disclosure (FSBO)

Exhibit 2 Real Estate Purchase Contract – Land (REPC)

Exhibit 3 Ruling and Order on June 19, 2014 Hearing of Defendants' Rule 60(b) Motion

Exhibit 1
For Sale By Owner Commission Agreement
& Agency Disclosure (FSBO)

FOR SALE BY OWNER COMMISSION AGREEMENT & AGENCY DISCLOSURE

This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.

1. THIS COMMISSION AGREEMENT is entered into on this 20th day of January 2006, between Re/Max Elite (Layton Branch) (the "Company"), including Tim Shea (the "Agent") as the authorized agent for the Company, and Chuck and Cathy Code (the "Seller") for real property owned by Seller described as follows: Pacel # 23-006-0006 Huntsville Ut 84310 (the "Property").

2. BROKERAGE FEE. The Seller agrees to pay the Company, irrespective of agency relationship(s), as compensation for services, a Brokerage Fee in the amount of $_____ or 3% of the acquisition price of the Property, if the Seller accepts an offer from Emmett Warren and or Assigns (the "Buyer"), or anyone acting on the Buyer's behalf, to purchase or exchange the Property. The Seller agrees that the Brokerage Fee shall be due and payable, from the proceeds of the Seller, on the date of recording of closing documents for the purchase or exchange of the Property by the Buyer or anyone acting on the Buyer's behalf. If the sale or exchange is prevented by default of the Seller, the Brokerage Fee shall immediately be due and payable to the Company.

3. PROTECTION PERIOD. If within 6 months after this Commission Agreement is entered into, the Property is acquired by the Buyer, or anyone acting on the Buyer's behalf, the Seller agrees to pay the Company the Brokerage Fee stated in Section 2. The Seller agrees to exempt the Buyer upon entering into a valid listing agreement with another brokerage.

4. SELLER WARRANTIES/DISCLOSURES. The Seller warrants that the individuals or entity listed above as the "Seller" represents all of the record owners of the Property. The Seller warrants that it has marketable title and an established right to sell, lease, or exchange the Property. The Seller agrees to execute the necessary documents of conveyance. The Seller agrees to furnish buyer with good and marketable title, and to pay at Settlement, for a standard coverage owner's policy of title insurance for the buyer in the amount of the purchase price. The Seller agrees to fully inform the Agent regarding the Seller's knowledge of the condition of the Property. The Seller agrees to personally complete and sign a Seller's Property Condition Disclosure form.

5. AGENCY RELATIONSHIPS. By signing this Commission Agreement, the Seller acknowledges and agrees that the Agent and the Principal/Branch Broker for the Company (the "Broker") are representing the Buyer. As the Buyer's Agent, they will act consistent with their fiduciary duties to the Buyer of loyalty, full disclosure, confidentiality, and reasonable care. The Seller acknowledges that the Company and the Agent have advised the Seller that the Seller is entitled to be represented by a real estate agent that will represent the Seller exclusively. The Seller has, however, elected not to be represented by a real estate agent in this transaction. The Seller further acknowledges and agrees that all actions of the Company and the Agent, even those that assist the Seller in performing or completing any of the Seller's contractual or legal obligations, are intended for the benefit of the Buyer exclusively. This Commission Agreement does not require the Company or the Agent to solicit offers on the Property from the Buyer, nor does it authorize the Company or the Agent to solicit offers from any other person or entity.

6. PROFESSIONAL ADVICE. The Company and the Agent are trained in the marketing of real estate. Neither the Company, nor the Agent are trained to provide the Seller or any prospective buyer with legal or tax advice, or with technical advice regarding the physical condition of the Property. If the Seller desires advice regarding: (i) past or present compliance with zoning and building code requirements; (ii) legal or tax matters; (iii) the physical condition of the Property; (iv) this Commission Agreement or (v) any transaction for the acquisition of the Property, the Agent and the Company STRONGLY RECOMMEND THAT THE SELLER OBTAIN SUCH INDEPENDENT ADVICE. IF THE SELLER FAILS TO DO SO, THE SELLER IS ACTING CONTRARY TO THE ADVICE OF THE COMPANY.

7. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after a closing related to this Commission Agreement, shall first be submitted to mediation through a mediation provider mutually agreed upon by the parties. If the parties cannot agree upon a mediation provider, the dispute shall be submitted to the American Arbitration Association. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Agreement shall apply.

8. ATTORNEY FEES. Except as provided in Section 7, in any action or proceeding arising out of this Commission Agreement involving the Seller and/or the Company, the prevailing party shall be entitled to reasonable attorney fees and costs.

9. SELLER AUTHORIZATIONS. The Company is authorized to disclose after closing the final terms and sales price of the Property to the following Multiple Listing Service: Wasatch Front Regional MLS

10. ATTACHMENT. There [ ] ARE [x] ARE NOT additional terms to this Commission Agreement. If "yes", see Addendum _____ incorporated into this Commission Agreement by this reference.

11. EQUAL HOUSING OPPORTUNITY. Seller and the Company agree to comply with Federal, State, and local fair housing laws.

12. FAXES. Facsimile (fax) transmission of a signed copy of this Commission Agreement, and retransmission of a signed fax, shall be the same as delivery of an original. If this transaction involves multiple owners this Commission Agreement may be executed in counterparts.

EXHIBIT 15 12/11/05

13. ENTIRE AGREEMENT. This Commission Agreement, including the Seller's Property Condition Disclosure form, contain the entire agreement between the parties relating to the subject matter of this Commission Agreement. This Commission Agreement may not be modified or amended except in writing signed by the parties hereto.

THE UNDERSIGNED do hereby agree to the terms of this Commission Agreement as of the date first above written.

(Seller's Signature)
Chuck and Cathy Code

(Seller's Signature)

The Company

By: _____ By: _____
(Authorized Agent)
Tim Shea

(Principal/Branch Broker)
M. Scott Quinney

COPYRIGHT© UTAH ASSOCIATION OF REALTORS® – 2000 REVISED 7.8.04 ALL RIGHTS RESERVED

Exhibit 2
Real Estate Purchase Contract – Land (REPC)

REAL ESTATE PURCHASE CONTRACT -- LAND

This is a legally binding contract. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Emmett Warren and or Assigns offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of $25,000 in the form of CHECK which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: _____ on _____ (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Re/Max Elite (Layton Branch) Phone Number: 801-825-3700

OFFER TO PURCHASE

1. PROPERTY: Land LLC. Still Standing Stables also described as: Parcel # 23-006-0006 City of Huntsville County of Morgan W68272 State of Utah, ZIP 84310 (the "Property").

1.1 Included Items. (specify) _____

1.2 Water Rights/Water Shares. The following water rights and/or water shares are included in the Purchase Price.
[ ] _____ Shares of Stock in the _____ (Name of Water Company)
[X] Other (specify) All rights attached to the property and or pertaining to the property.

2. PURCHASE PRICE The purchase price for the Property is $4362500
The purchase price will be paid as follows:
$25,000 (a) Earnest Money Deposit. Under certain conditions described in this Contract THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.
$_____ (b) New Loan. Buyer agrees to apply for one or more of the following loans:
[X] CONVENTIONAL [ ] OTHER (specify) _____
If the loan is to include any particular terms, then check below and give details:
[ ] SPECIFIC LOAN TERMS _____
$_____ (c) Seller Financing. (see attached Seller Financing Addendum, if applicable)
$_____ (d) Other (specify). _____
$_____ (e) Balance of Purchase Price in Cash at Settlement.
$4362500 PURCHASE PRICE. Total of lines (a) through (e)

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(c), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (½) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(c), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: [X] Upon Closing [ ] Other (specify)

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this contract:
[ ] Seller's Initials [ ] Buyer's Initials

Listing Agent _____ represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

Listing Broker for _____ (Company Name) represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

Buyer's Agent Tim Shea, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

Buyer's Broker for Remax Elite (Scott Quinney), (Company Name) represents [ ] Seller [X] Buyer [ ] both Buyer and Seller as a Limited Agent;

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(a), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":
(a) a Seller property condition disclosure for the Property, signed and dated by Seller;
(b) a commitment for the policy of title insurance;
(c) a copy of any leases affecting the Property not expiring prior to Closing;
(d) written notice of any claims and/or conditions known to Seller relating to environmental problems;
(e) evidence of any water rights and/or water shares referenced in Section 1.2 above; and
(f) Other (specify) _____

8. **BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE.** Buyer's obligation to purchase under this Contract (**check applicable boxes**):
(a) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
(b) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
(c) [ ] IS [X] IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;
(d) [X] IS [ ] IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;
(e) [X] IS [ ] IS NOT conditioned upon the Property appraising for not less than the Purchase Price;
(f) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;
(g) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)
Soil Test
If any of items 8(a) through 8(g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as Buyer's "Due Diligence." Unless otherwise provided in this Contract, Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence and with a final pre-closing inspection under Section 11.

8.1 Due Diligence Deadline. No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, The Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted

In Section 10.

9. **ADDITIONAL TERMS.** There [ ] ARE [ ] ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: [ ] Addenda No.'s _____ [ ] Seller Financing Addendum [ ] Other (specify) _____

_____

10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

IF ANY PORTION OF THE PROPERTY IS PRESENTLY ASSESSED AS "GREENBELT" (CHECK APPLICABLE BOX):

[X] SELLER [ ] BUYER SHALL BE RESPONSIBLE FOR PAYMENT OF ANY ROLL-BACK TAXES ASSESSED AGAINST THE PROPERTY.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

(a) the Property shall be free of debris and personal property;

(b) the Property will be in the same general condition as it was on the date of Acceptance.

11. FINAL PRE-CLOSING INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a final pre-closing inspection of the Property to determine only that the Property is "as represented," meaning that the Property has been repaired/corrected as agreed to in Section 8.4, and is in the condition warranted in Section 10.2. If the Property is not as represented, Seller will, prior to Settlement, repair/correct the Property, and place the Property in the warranted condition or with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement sufficient to provide for the same. The failure to conduct a final pre-closing inspection or to claim that the Property is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the Property as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances affecting the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

[ ] SHALL

[X] MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon

demand.

17. **ATTORNEY FEES AND COSTS.** In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. **NOTICES.** Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. **ABROGATION.** Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. **RISK OF LOSS.** All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. **TIME IS OF THE ESSENCE.** Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. **FAX TRANSMISSION AND COUNTERPARTS.** Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. **ACCEPTANCE.** "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. **CONTRACT DEADLINES.** Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Seller Disclosure Deadline	15 DAYS FROM WRITTEN ACCEPTANCE	(Date)
(b) Due Diligence Deadline	60 DAYS FROM WRITTEN ACCEPTANCE	(Date)
(c) Settlement Deadline	90 DAYS FROM WRITTEN ACCEPTANCE	(Date)

25. **OFFER AND TIME FOR ACCEPTANCE.** Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 6:00 [ ] AM [X] PM Mountain Time on January 23, 2006 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

2-6-06

(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

Emmett Warren and or Assigns
(Buyers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

[ ] **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

2-7-06

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Chuck Schwenzel LLC 2920 W. Directors Row SLC 84104 801-381-4825

(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

[ ] **REJECTION:** Seller rejects the foregoing offer.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

©Copyright Utah Association of REALTORS® 7.8.04 All Rights Reserved UAR FORM 19

Exhibit 3
Ruling and Order on June 19, 2014
Hearing of Defendants' Rule 60(b) Motion

The Order of Court is stated below:
Dated: October 04, 2014 08:44:54 AM
/s/ Noel S. Hyde
District Court Judge

L. MILES LEBARON (#8982)
BRIAN P. DUNCAN (#11487)
LEBARON & JENSEN, P.C.
476 West Heritage Park Blvd., Suite 230
Layton, Utah 84041
Telephone: (801) 773-9488
Facsimile: (801) 773-9489

IN THE SECOND JUDICIAL DISTRICT IN AND FOR WEBER COUNTY, STATE OF UTAH, OGDEN DEPARTMENT

Hilary "Skip" Wing, et al,

Plaintiffs,

vs.

Still Standing Stable, L.C., et al.

Defendants.

Ruling and Order on June 19, 2014 Hearing of Defendants' Rule 60(b) Motion

Civil No. 060906802

Honorable Noel S. Hyde

On June 19, 2014, the Honorable Noel S. Hyde held a hearing on Defendants' Rule 60(b) Motion. L. Miles LeBaron of LeBaron & Jensen, P.C. appeared for the Plaintiffs; Robert J. Fuller appeared for Defendant Chuck Schvaneveldt and Still Standing Stables, L.C.; Scott R. Edgar appeared for Third-Party Defendant Cathy Code; and Alan S. Mouritsen of Parsons Behle & Latimer appeared for Defendant Chuck Schvaneveldt.

Ruling on 60(b) Motion

The Court considered the Defendants' Motion 60 (b). The Court's ruling on this particular motion is that Rule 60(b) does contain time restrictions with respect to some of the subparts, and that that time restriction is a three-month time restriction, not a ten-day restriction. The reference, I believe, to the ten-day restriction is the reference in 60(b)(2), to new evidence, which is demonstrated not to have been able to have been brought forward in time to file a motion under Rule 59. A motion under Rule 59 to alter or amend a judgment would necessarily be filed within ten days after the judgment, and the Court's ruling on this issue is that that ten-day limit that does apply under Rule 59, does not become incorporated into and require the filing of the motion under Rule 60. The question, with respect to the introduction or consideration of new evidence simply requires a showing that that new evidence could not reasonably have been produced in sufficient time to bring a motion under Rule 59. It does not require that the motion under Rule 60 itself be brought within that ten-day time period. The Court's ruling on that issue is that the motion is timely and properly before the Court.

The motion does not assert or request relief under 60(b)(2), although the plaintiff suggests that it may be entirely resolved under 60(b)(2).

The Court finds the argument of plaintiff not to be persuasive, 60(b)(2) being the provision with respect to the consideration of new evidence. No relief has been requested on the basis that new evidence has come to light, which would justify relief from the judgment, and that could not have been provided prior to the filing -- or within time to file a motion under Rule 59. That particular form of relief has not been requested.

The relief that has been requested is relief based upon the assertion, either under Rule 60(b)(4); that the judgment itself is void, and that is based upon the jurisdiction the claims, or under Rule 60(b)(5), that the case has been released, discharged, or otherwise settled or resolved, which is not dependent upon a showing of evidence, but actually the fact of a release or resolution. And then finally, 60(b)(6), which is a catch-all provision. I'm going to address 60(b)(6) first.

Inasmuch as the substance of the arguments go to the jurisdictional question and whether the claim has been settled, the Court rules that the references to 60(b)(6) simply don't provide any additional alternative grounds for relief, and that simply adding 60(b)(6) does not bolster claims under any of the other subparts. So if relief is appropriate under 60(b)(4), it should be granted under 60(b)(4). If the basis does not exist under 60(b)

(4), the facts alleged in support of that basis do not form a separate basis, then, for relief under 60(b)(6). 60(b)(6) is not just a means by which the form of relief requested being insufficient under a stated grounds, then becomes sufficient when stated under 60(b)(6). The Court's ruling is that there has not been a proper showing of any separate basis for relief under 60(b)(6), and the Court's going to address the motions under 60(b)(4) and 60(b)(5).

First, with respect to 60(b)(5), which is that the case has been settled, released, or discharged, and that therefore there is no basis for going forward with the enforcement of the judgment. The legal basis for this argument is that Mr. Dale Quinlan, who has executed documents purporting to settle and release or resolve these claims, has the legal authority to do so. Necessarily, that would require the Court to find that Mr. Quinlan has legal ownership of the claims and the right to settle.

Tracking back through the documentation and the presentation of the parties, the issue comes back to a single document, which is a letter in the file of the Department of Corporations dated December 11th, 2013, a letter which contains two sentences. "Because of administrative action the attached letter in the file of Re/Max Elite, File No. 5800619-0151, comma, had been invalidated, period. The ownership of the dba, Re/Max Elite, has

been returned to Dale Quinlan." That is the sum total of the documentation on which Mr. Schaneveldt relies to establish Mr. Quinlan's present claim of ownership. Now, this is tied to a previous signature on an application in 2004, but it is this letter which would necessarily result in a change of the Department of Corporation's records, to reflect Mr. Quinlan as the owner of the dba, effective as indicated by counsel, March 3rd, 2014, with a dba being returned to him. With respect to this letter, the Court's ruling is that this letter will not be given any legal consideration by the Court, for the following reasons:

First, there is a reference in this letter to an administrative action. There, however, is no description of any administrative action ever having been taken, any notices or any parties that may have participated in this action, who may have requested the particular relief. There is no indication that any hearings were conducted, that notices were given to any parties. There has been suggestion by counsel that that may have happened, but there is simply no record at all to suggest what this term means, and to what it refers.

There is also the statement that this letter had been invalidated. That's a letter referencing an assignment letter purportedly signed by Mr. Quinlan. Again, there's no indication of the process or procedure by which

that determination was made. There is nothing to indicate a judicial determination of the validity or invalidity of the letter, and there is simply nothing to support this letter being a proper determination of any issue by the Department of Corporations.

There have been numerous references to the statutes and rules that must be complied with in respect to the registration and transfer of dbas, and there are very specific procedures. There has been no argument or suggestion that this letter complies with any specific statute, rule, or procedure that authorizes any change in a designated ownership of a dba. Absent some showing, both factually and legally, as to the procedure that was followed to obtain this letter, and the legal sufficiency of that procedure, the Court will not give it any legal significance. The Court further notes that to do so may very well constitute a violation of due process rights, without some showing that the parties asserting interest in this particular dba had been given an opportunity to have input before their property or ownership interest in that dba was effected somehow by the Department of Corporation. The Court is not ruling that such actions did not take place, it's only ruling that no information has been provided to this Court upon which a determination can be made that any appropriate process was followed to obtain this letter, and therefore the Court will not give it any legal

consideration. Based upon that determination, the Court's ruling is that the suggestion that the dba was returned to Dale Quinlan, effective March 3rd, 2014, is legally not recognized; and that, therefore, the dba registration continues unaffected by this letter, and its ownership is not resolved by this letter, and that there is an insufficient record before the Court to establish Mr. Quinlan as the owner of the dba, either in March of 2014 or at any time thereafter.

Based upon the absence of a legally sufficient basis to establish Mr. Quinlan as the owner of the dba, his asserted right to settle claims held in the name of that dba, or to address or resolve any issues relating to that dba, will not be given consideration by the Court. And to the extent that documents may have been prepared and signed that purport to do that, those documents are not given legal credibility by the Court and will not be considered.

Therefore, the Court rules that there has not been a release, discharge, or other resolution or settlement of the claim; and therefore the request for relief under Rule 60(b)(5) is overruled and the motion to that extent denied.

The next issue raised -- arises under Rule 60(b)(4), which is an allegation of a void judgment. To some extent the argument is similar, and

the argument that the judgment is void addresses claims of improper parties proceeding in this case, parties without proper standing, and the absence of Mr. Quinlan's participation being fatal to both the mediation and to the judgment, or to its enforceability.

The Court is not going to repeat its rulings of yesterday or today except to refocus a couple of specific points. And those points are that the question of standing was addressed by the Court in motions prior to the trial, and resolved by the Court at that time, and there has been no showing that any of the evidence that was available to the Court, either at that time or at trial, would justify a change in any of those rulings. And the Court declines to make any modification on that basis first; and secondly, based upon the Court's ruling yesterday, that the judgment, once entered, is presumptively correct, and the Court is required, in viewing the facts that are presented in the case, to construe those facts in a way that is consistent with the judgment. To some extent, when a party is coming in requesting that there be a deviation from the judgment, either as to form or substance, that, to some extent, requires a marshalling of the evidence presented at trial, that supports the judgment first, so that the Court can see what evidence there was that is supportive of the findings that were made, and then demonstration that, notwithstanding that evidence,

there is justification for either relief or modification. That showing has not been made in this case.

Further, with respect to the standing of Mr. Quinlan, or the assertion that his participation would be required, the Court notes, and very significantly, that at no time, even through today's date, has Mr. Quinlan, either individually or through counsel, come forward to assert any claim to anything? He is not here today. He is not asserting that he owns anything, that he has any rights. He has not attempted to intervene in this case, to assert any of those rights. He has taken no action whatever. The positions that have been maintained effectively on his behalf have been maintained by Mr. Schaneveldt, but there's no indication that Mr. Schaneveldt or his counsel has any right to assert claims of Mr. Quinlan but for the assignment documents which the Court has previously ruled it will give no legal credence in this case. So that is not to be critical of counsel's presentation, because there is a document that purports to assign claims, but the Court rules that that assignment is not to be given any legal force or effect, based upon the Court's ruling on the status of the dba.

The next issue goes to the argument relating to the failure to maintain the dba, or the ability of an entity to maintain an action without a properly registered dba. Counsel for Mr. Schaneveldt poses the question, Who can

step forward, showing that they are in compliance with all of the requirements of the dba statute? The Court's ruling is that question is not the right question. There are actually two questions that must be answered in order to determine whether there was a proper judgment entered.

The first question is was there a properly registered and existing dba for the business entity that asserted the claim? And the answer to that question based upon all of the information that's been presented to the Court, is that at all times relevant in all proceedings before the Court, there is and has been a duly filed and properly registered dba. That is the first question, there being a properly registered dba.

The second question is, Who is the owner of that dba? But those are separate questions. The question of the ability to maintain a lawsuit, or the inability to maintain a lawsuit is dependent upon the absence of a properly registered dba. That's the Graham case. In this case, there has never been a showing that there is an improperly registered dba, or that the dba has not been recognized by the state. There has been substantial argument about who owns the dba, but that's a different question. And that question, the Court's ruling is that prior to the trial in this case, there was substantial discussion on standing issues, and who could appear, and whose rights were being represented, who were the real parties in interest. The Court has

made previous rulings on those issues, and those rulings are not going to be disturbed by the Court today. There is evidence that is even before the Court today, including the record of the Department of Corporations, that shows Legacy Elite as a registered owner of the dba during particular time periods. There is documentation that shows Aspenwood Real Estate, either as an LLC or as a corporation, as a registered owner of the dba at various time. There are documents which purport to assign the dba between those entities. There is a document, purportedly signed by Mr. Quinlan, that purports to transfer whatever interest he may have had, whether that was a bare legal title to the dba that was equitably owned by the corporation already, or whether it was something else. That kind of information is not before the Court. But to be consistent with the prior rulings, the Court's ruling today is that the evidence is sufficient to maintain all of the prior rulings of the Court with respect to the issues of standing and ownership of the dba, and those rulings will not be disturbed. The suggestion that all of the documentation now produced, and the arguments now being made, that Mr. Quinlan, in fact, has at all times been the real party in interest, and is the only party that has the right to proceed, are simply not persuasive.

The Court's observation of this case, from the review of the proceedings up to the point of trial and then during the post-trial process, is

that this issue of Mr. Quinlan's ownership of the dba, and his derivative right therefore to effectively control these claims or to transfer them, assign them, or compromise them, is a construct, all of which has occurred after trial. And it is a construct which is based, to a large extent, on a letter, December 11th, 2013, that the Court has previously made reference to, which appears to be a deviation from any recognized practice of the Department of Commerce. It presupposes findings with respect to issues of forgery, or cutting and pasting of documents. None of those issues have ever been presented on an evidentiary basis to the Court, and the Court, in light of both the timing of its presentation, the fact that Mr. Quinlan's involvement, both in the business entity and in the registration of the dba, is a matter of public record that has existed for many years, and questions that the Court has raised with respect to these documents, the Court will simply not countenance the legal argument that Mr. Quinlan is effectively the superseding entity with respect to these claims, and that argument is not given further legal consideration by the Court.

Similarly, the argument with respect to the necessity that the Court determine that the judgment is void because of failure to comply with the requirements of mediation, while there have been suggestions that specific requirements of the mediation rules or statutes may not have technically

been complied with, there's been no indication that there was any objection made at the time, or that these issues were even raised until they have now come up, well after trial, well after the conclusion of that mediation. And again, based upon a construct to some extent which superimposes Mr. Quinlan's purported rights into that process, suggesting that the failure of his participation may also necessarily constitute a failure of the legal sufficiency of the mediation, the Court simply will not consider those arguments, based upon the analysis which has previously been made. And the record before the Court is that a mediation was ordered, and that a mediation was conducted. Whether there were technical deficiencies in that mediation, to this Court's knowledge, they weren't ever brought to the Court's attention in a manner that would have permitted the Court to address deficiencies with respect to the mediation, or, at the time, that would have permitted the parties to also address those particular issues.

There has been nothing argued to the Court on those points, and the Court rules that the argument with respect to the insufficiency of the mediation is not persuasive; therefore, the Court's ruling is that the asserted grounds for relief under Rule 60(b)(4), that the judgment itself is void, are not well taken. That objection to the form of the judgment is overruled, and the motion for relief denied. And I believe that is all of the issues that were

addressed in the 60(b) motion.

ORDER

Based upon the Court's Ruling, it is hereby ordered as follows:

1. Defendants' Rule 60(b) Motion is denied.

----------END OF ORDER----------

In accordance with the Utah State District Courts Efiling Standard No. 4, and URCP Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.

Approved as to form and content:

/s/ Gary E. Doctorman
Gary E. Doctorman
Alan S. Mouritsen
PARSONS BEHLE & LATIMER
Attorneys for Defendant Charles Schvaneveldt

/s/ Robert J. Fuller
Robert J. Fuller
Attorney for Defendant Still Standing Stables, L.C.

/s/ L. Miles Lebaron
L. Miles Lebaron
Brian P. Duncan
LEBARON & JENSEN, P.C.
Attorneys for Plaintiffs

/s/ Scott R. Edgar
Scott R. Edgar
Attorney for Defendant Cathy Code

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was submitted for electronic filing, and was thus sent to all counsel of record by email:

Robert R. Wallace
Kirton McConkie
60 East South Temple #1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Robert J. Fuller
1090 North 5900 East
Eden, Utah 84310

Scott R. Edgar
1379 North 1075 West, Suite 226
Farmington, Utah 84025

Gary E. Doctorman
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111

on this 22nd day of August 2014.

/s/ Lisa LeBaron